No. 19-_____

In the United States Court of Appeals for the Fifth Circuit

In re REBEKAH GEE, Secretary of the Louisiana Department of Health; and JAMES E. STEWART, SR., District Attorney for Caddo Parish,
Petitioners

****

JUNE MEDICAL SERVICES, LLC d/b/a HOPE MEDICAL GROUP FOR WOMEN, on behalf of its patients, physicians, and staff; and DR. JOHN DOE 1 and DR. JOHN DOE 3, on behalf of themselves and their patients,
Plaintiffs

v.

REBEKAH GEE, in her official capacity as Secretary of the Louisiana Department of Health; and JAMES E. STEWART, SR., in his official capacity as District Attorney for Caddo Parish,
Defendants

On Petition for Writ of Mandamus to U.S. District Court, Middle District of Louisiana
No. 17-cv-404-BAJ-RLB

PETITION FOR WRIT OF MANDAMUS

Stephen S. Schwartz
James A. Heilpern
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
SSchwartz@Schaerr-Jaffe.com
JHeilpern@Schaerr-Jaffe.com

Elizabeth B. Murrill
Solicitor General
Joseph Scott St. John
Deputy Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. 3rd St.
Baton Rouge, LA 70802
(225) 326-6766
MurrillE@ag.louisiana.gov
StJohnJ@ag.louisiana.gov

Counsel for Petitioners

CERTIFICATE OF INTERESTED PERSONS

No. 19-_____, *June Medical Servs., LLC, et al. v. Rebekah Gee, et al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs	Plaintiffs' Counsel
CURRENT PLAINTIFFS 1. June Medical Services, LLC d/b/a Hope Medical Group for Women Dr. John Doe 1; Dr. John Doe 3 (physicians at plaintiff clinic)	**CURRENT COUNSEL** 1. DEBEVOISE & PLIMPTON LLP; Shannon Rose Selden; Amanda M. Bartlett; Anna Moody; Zachary H. Saltzman 2. RITTENBERG, SAMUEL & PHILLIPS LLC; Charles M. Samuel, III CENTER FOR REPRODUCTIVE RIGHTS; Caroline Sacerdote; Jenny Ma; Alexandra Thompson
FORMER PLAINTIFF 1. Dr. John Doe 7	**FORMER COUNSEL** 1. DEBEVOISE & PLIMPTON LLP; Holly S. Wintermute 2. CENTER FOR REPRODUCTIVE RIGHTS; David Brown; Zoe Levine

Defendants	Defendants' Counsel
1. Rebekah Gee, Secretary of the Louisiana Department of Health 2. James E. Stewart, Sr., District Attorney for Caddo Parish	**CURRENT COUNSEL** 1. LOUISIANA DEPARTMENT OF JUSTICE; Jeff Landry, Louisiana Attorney General; Elizabeth B. Murrill, Solicitor General; J. Scott St. John, Deputy Solicitor General 2. SCHAERR | JAFFE LLP; Stephen S. Schwartz; James A. Heilpern **FORMER COUNSEL** SCHAERR | DUNCAN LLP; S. Kyle Duncan

/s/ Elizabeth B. Murrill
Elizabeth B. Murrill
Counsel for Petitioners

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INTRODUCTION

Plaintiffs — a Louisiana abortion clinic and two of its doctors — challenge Louisiana's system of abortion clinic regulation, relying on claims against the *cumulative* effects of over a dozen licensing and health statutes and twenty-three regulations. Plaintiffs' cumulative-effects claims sweep in regulations that Plaintiffs' complaint does not even mention, let alone address with well-pleaded, justiciable allegations. The number and diversity of challenged regulations foils any judicially administrable standard, and Plaintiffs have been candid that they expect their case to usher in judicial supervision of Louisiana abortion clinic regulation on the same scale as court-managed desegregation. No abortion case has ever authorized such claims, or such relief.

The district court, for its part, effectively abandoned its obligation to police Plaintiffs' claims and its own jurisdiction. Although the lower court largely agreed that Plaintiffs' challenges fail ordinary pleading and jurisdictional requirements, it considers it "untenable" to compel abortion providers to abide by the same standards as other litigants. The court's expressed reason is that federal courts should be open to more abortion litigation, and of broader scope, than the usual standards allow.

In so doing, the district court has violated the binding directions of this Court and the Supreme Court.

It is no exaggeration to say that this case — in which a federal district court cast aside binding precedent and jurisdictional limitations in order to expand judicial supervision of a State and its instrumentalities — goes to the heart of an Article III court's place in our federal system. This Court should grant mandamus to confine the district court to its proper role.

ISSUE PRESENTED AND RELIEF REQUESTED

The Petition presents the following questions for review:

1. Can abortion providers challenge the cumulative effects of a State's statutes and regulations governing abortion clinics, apart from the identifiable effects of specific statutes and regulations?
2. In the alternative, can abortion providers challenge the cumulative effects of a State's statutes and regulations governing abortion clinics without including well-pleaded, justiciable claims as to each law individually?

Petitioners request that this Court grant a writ of mandamus compelling the district court (1) to dismiss Counts I and V of Plaintiffs'

Amended Complaint, and (2) to evaluate Plaintiffs' challenges to individual abortion laws under the correct pleading and jurisdictional standards.

STATEMENT OF FACTS

A. Louisiana's Regulation of Abortion Clinics.

Louisiana has long been concerned that the State's abortion clinics, including the Plaintiff clinic, threaten the health and safety of their patients. The clinics have a "horrifying" history of unsafe and illegal practices such as "unsanitary conditions and protection of rapists." *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787, 806 (5th Cir. 2018) ("*JMS*"), *reh'g en banc denied*, 913 F.3d 573 (2019), *mandate stayed*, 139 S. Ct. 663 (Feb. 9, 2019), *pet. for cert. filed*, No. 18-1323 (Apr. 17, 2019). When hiring doctors, Louisiana abortion clinics "do not appear to undertake any review of a provider's competency," *id.* at 805; the Plaintiff clinic and Plaintiff Dr. Doe 3 have even tried to train a radiologist and ophthalmologist to perform abortions. *Id.* at 799. Louisiana therefore created a legal framework for regulating abortion clinics.[1]

[1] Many Louisiana abortion regulations resemble laws that have been upheld by this Court and the Supreme Court. Even in divided decisions *invalidating* abortion laws, the Supreme Court appears unanimous that "detailed regulations" enforced by regular inspections help States prevent recrudescence of abortion clinics like Dr.

First, Louisiana requires that abortion clinics obtain licenses from the Louisiana Department of Health ("LDH"). *See* La. R.S. § 40:2175.4(A). The principal statutes governing abortion clinic licenses, codified at La. R.S. § 40:2175.1 *et seq.*, comprise the Outpatient Abortion Facility Licensing Law ("OAFLL").[2] OAFLL delineates the characteristics of abortion clinic licenses, La. R.S. § 40:2175.4 (establishing a one-year, non-transferable license valid at a single location), as well as the process of applying for, issuing, and terminating licenses, La. R.S. § 40:2175.6. OAFLL also authorizes LDH "to promulgate and publish rules and regulations to provide for the health, safety, and welfare of women in outpatient abortion facilities and for the safe operation of such facilities," provided that such regulations do not "impose a legally significant burden on a woman's freedom to decide whether to terminate her pregnancy." La. R.S. § 40:2175.2; *see also* La. R.S. § 40:2175.5.

LDH has exercised that rulemaking authority by promulgating licensing rules for abortion clinics. *See* La. Admin. Code tit. 48, ch. 44 There are now 23 abortion clinic licensing regulations, divided into

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Kermit Gosnell's. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2314 (2016) *as revised* (June 27, 2016); *id.* at 2343–44 (Alito, J., dissenting).

[2] *See also* La. R.S. § 40:2199(A) (establishing penalties for operating certain medical facilities, including abortion clinics, without a license or in violation of licensing laws).

subchapters addressing licensing and inspection procedures (Subchapter A), clinic administration (Subchapter B), standards for patient care (Subchapter C), and the clinic's physical environment (Subchapter D). One regulation provides that abortion clinics should use sterile instruments, *see* La. Admin. Code § 48:4447; another requires that abortion clinics comply with State laws on reporting crimes against children, *see* La. Admin. Code § 48:4425(F). Others apply in specific circumstances, such as when an abortion clinic changes its location, personnel, or ownership. *E.g.*, La. Admin. Code § 48:4409.

Second, in addition to OAFLL and the LDH licensing regulations, Louisiana has a statutory framework regulating abortion, most of which is codified at La. R.S. tit 40, ch. 5. Among other legitimate purposes (such as expressing respect for unborn life), those statutes ensure that Louisiana abortion clinics and their staffs meet standards of medical qualifications and competence, *e.g.*, La. R.S. § 40:1061.10(A)(1); *see also* La. R.S. §§ 14:32.9(A), 14:32.9.1, obtain the informed consent of their patients, *e.g.*, La. R.S. § 40:1061.17, and collect relevant data for patient protection and public use, *e.g.*, La. R.S. § 40:1061.21.

B. Procedural History.

This case already has a complex history, a brief summary of which will aid the Court in understanding Plaintiffs' present claims.

1. Plaintiffs' Original Complaint.

Count I of Plaintiffs' original Complaint challenged OAFLL itself plus twelve other abortion statutes (which Plaintiffs call the "Sham Health Statutes"). *See* Doc. 1 at 50, ¶ 221; *id.* at 2, ¶ 4. Plaintiffs challenged the statutes *en masse*, alleging that the laws cumulatively impose an "undue burden" on the abortion decision.[3] *Id.* at 50–51, ¶ 222. Plaintiffs represented that they intended to obtain "tailored injunctions requiring [Louisiana] government agencies to take specific steps over a specified time to bring their policies and practices in line with the Constitution," citing for their model the decades when federal courts supervised desegregation of Louisiana school systems. *See* Doc. 32 at 10 & n.5.

Plaintiffs did not challenge specific licensing regulations promulgated under OAFLL. Rather, they asserted that OAFLL

[3] The "undue burden" standard invalidates laws that pose a "substantial obstacle" to the decision to obtain an abortion. *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 874 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

regulations include "well over a thousand requirements," *id.* at 6, ¶ 23, all of which would presumably be invalidated if OAFLL itself were enjoined — regardless of health benefits, and regardless of whether Plaintiffs would even have standing or ripe claims as to the regulations individually. The twelve challenged health statutes address distinct aspects of abortion including doctor qualifications, La. R.S. §§ 14:32.9, 14:32.9.1; La. R.S. § 40:1061.10(A)(1), ultrasound and informed consent practices, La. R.S. §§ 40:1061.10(D)(1), 40:1061.16(B)–(C), 40:1061.17(B), 40:1061.17(C)(8), administration of medical abortion, La. R.S. § 40:1061.11, and recordkeeping and reporting requirements, La. R.S. §§ 40:1061.11, 40:1061.17(G), 40:1061.19, 40:1061.21.

Defendants moved to dismiss. Defendants explained that Plaintiffs' cumulative-effects challenge was not viable under Supreme Court standards, which require claims directed at individual laws. Doc. 22-1 at 4–6. Defendants further showed that even if Plaintiffs could challenge the cumulative effects of abortion regulations, they cannot use such a suit to challenge laws that they did not adequately challenge individually — *i.e.*, the many uncontroversial licensing regulations that would fall if OAFLL itself were enjoined. Doc. 22-1 at 6—10.

The district court granted Defendants' motion in part, but denied it as to Plaintiffs' cumulative-effects theory. Doc. 60.[4] The district court first held — relying principally on the Supreme Court's decision in *Whole Woman's Health v. Hellerstedt* — that Plaintiffs *can* challenge the cumulative effects of abortion regulations. *Id.* at 8–10. Turning to Plaintiffs' failure to identify particular regulations, the district court acknowledged that "Plaintiffs do not allege that every exercise of rulemaking authority under OAFLL has resulted in an undue burden[.]" *Id.* at 12. But the court nonetheless held that because "OAFLL is the fountainhead from which the State's restrictions on Clinic Plaintiff flows," Plaintiffs should not "be forced to specify each and every regulation challenged[.]" *Id.* at 11.

Defendants moved for certification of the district court's order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Doc. 65. The district court granted certification, reasoning that Defendants "raise a threshold question concerning whether Plaintiffs' key claim is colorable." Doc. 76 at 3. It also agreed that Plaintiffs' claims involved "a difficult

[4] The Court granted Defendants' Motion to Dismiss with respect to Plaintiffs' procedural due process claim (Count II), and denied it with respect to Plaintiffs' cumulative-effects (Count I) and Fourth Amendment (Count III) claims.

issue of first impression that requires the interpretation of recent Supreme Court precedent without the benefit of clarification from the United States Court of Appeals for the Fifth Circuit." *Id*. Defendants filed a petition for leave to appeal in this Court. *See* May 25, 2018 Petition, No. 18-90024.

But while Defendants' petition was pending, Plaintiffs moved to rescind the certification. Doc. 79. Plaintiffs argued that the issues Defendants raised could be resolved by "more granular pleadings regarding Plaintiffs' substantive due process claims, particularly as to OAFLL and its regulations," and they offered to file an amended complaint. Doc. 79-1 at 4. The Court granted the motion over Defendants' opposition. Doc. 84. This Court then denied Defendants' Section 1292(b) petition as moot. *See* Jul. 2, 2018 Order, No. 18-90024.

2. Plaintiffs' Amended Complaint.

Plaintiffs' Amended Complaint, contrary to Plaintiffs' assurances to the district court, involves fundamentally the same cumulative-effects theory as the original Complaint. Plaintiffs still challenge OAFLL as a whole, including every statute that forms OAFLL and (presumably) all the regulations implementing it — even the regulation requiring sterile

instruments. La. Admin. Code § 48:4447. Plaintiffs still challenge the same twelve health statutes, and they still challenge the cumulative effects of Louisiana laws. The Amended Complaint differs from the original in two ways.

First, in addition to their cumulative-effects challenges, Plaintiffs purport to challenge certain specific laws. Although Plaintiffs' challenge to OAFLL would appear to cover all 23 licensing regulations, Plaintiffs specifically challenge thirteen of those regulations. *See* Doc. 87 at 2–3, ¶ 5.[5] Plaintiffs plead that their cumulative challenge to OAFLL includes those regulations, and they have added a count claiming that the thirteen regulations are unconstitutional individually. *Id.* at 53–55, ¶¶ 186–87 (Count II). Plaintiffs have also added a count claiming that the twelve health statutes are individually unconstitutional. *Id.* at 55–57, ¶¶ 188–89 (Count III).[6]

Although the Amended Complaint purports to challenge several statutes and regulations individually as well as based on their

[5] The thirteen regulations are La. Admin. Code tit. 48, §§ 4401, 4403, 4407, 4411, 4417, 4423, 4425, 4431, 4433, 4435(C), 4437(A)(4)–(5), 4437(B)(1), and 4445. Doc. 87 at 3, ¶ 5.

[6] The Amended Complaint also realleges the Fourth Amendment claim that appeared in Plaintiffs' original Complaint. Doc. 87 at 57–58, ¶¶ 190–91 (Count IV).

cumulative effects, the substance one would expect in true individual challenges is often missing. As to OAFLL itself, Plaintiffs still do not plead standing or other facts needed to challenge each implementing regulation. As to several statutes and regulations within the cumulative-effects challenges that Plaintiffs also purport to challenge individually, Plaintiffs omit facts that are ordinarily essential to state well-pleaded, justiciable claims. To cite a few of the most obvious examples:

- Although Plaintiffs continue to challenge the statutes that comprise OAFLL, Plaintiffs provide no allegations explaining why Plaintiffs challenge OAFLL's definitions, La. R.S. § 40:2175.3, its requirement for a single-location, one-year, non-transferable license, La. R.S. § 40:2175.4, or its authorization for LDH rulemaking, La. R.S. § 40:2175.5.
- Three other challenged laws, La. R.S. § 40:1061(A)(1) and La. R.S. §§ 14:32.9, 14:32.9.1, set medical staffing qualifications for outpatient abortion facilities. *See also* La. Admin. Code § 48:4423. But Plaintiffs do not plead that they wish to hire anyone who is not a doctor qualified under current law.

- Another challenged law, La. Admin. Code § 48:4401, is a set of definitions applicable to the licensing regulations governing abortion clinics. The factual body of Plaintiffs' Amended Complaint only mentions it three times, *see* Doc. 87 at 3, ¶ 5; *id.* at 17, ¶¶ 58–59, and Plaintiffs do not say which definitions they object to. Yet they have included that law as part of their cumulative-effects challenge.
- Another provision included in that challenge, La. Admin. Code § 48:4411, which governs license renewal, appears four times in Plaintiffs' Amended Complaint. *See* Doc. 87 at 3, ¶ 5; *id.* at 17, ¶¶ 58–59; *id.* at 23, ¶ 62. But Plaintiffs' only specific objection is that it "requires submitting another application, additional documents, and a fee," *id.* at 18, ¶ 59, features of any health facility licensing system.
- Another included provision, La. Admin. Code § 48:4445, governs the physical environment of an abortion clinic. Plaintiffs object that its requirements are "unnecessary" and have "no medical benefit," mentioning the regulation's requirements as to "sink faucets[;] … signage; procedure

rooms; post-anesthesia recovery areas; equipment and supply storage areas; and, if applicable, in-house laundry." Doc. 87 at 20, ¶ 59. Plaintiffs do not allege that their facilities are out of compliance with these requirements or that they have any intention of changing their facilities' physical characteristics (many of which are literally set in stone). Yet still they include the regulation in their cumulative-effects challenge.

Second, Plaintiffs' Amended Complaint now contains two cumulative-effect challenges instead of one. Count I again challenges OAFLL in its entirety, just as the original Complaint did, including the thirteen specified regulations. *See* Doc. 87 at 53, ¶ 185; *id.* at 2, ¶ 5 (defining OAFLL). And Plaintiffs have added Count V, which raises *another* cumulative-effects challenge to OAFLL (including the specified regulations) and the twelve health statutes based on Plaintiffs' own equal protection rights. *Id.* at 58, ¶ 193.[7]

Undisputedly, Counts I and V are still based on the cumulative effects of dozens of statutes and regulations that govern abortion in

[7] Plaintiffs have no fundamental right to perform abortions. *See Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (en banc); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 547 (9th Cir. 2004).

distinct ways. And Plaintiffs request that the challenged laws be broadly enjoined based on those cumulative effects. *Id.* at 58–60, §§ 1a, 1c, 2a, 2c.

3. Denial of Defendants' Renewed Motion to Dismiss.

Defendants moved for partial dismissal of the Amended Complaint, explaining that Plaintiffs' new cumulative-effects challenges have the same defects as before. Doc. 95. Defendants also moved, in the alternative, that the district court re-certify the case for interlocutory appeal. *Id*. On March 29, 2019, the district court denied Defendants' motion.[8]

The Court acknowledged Defendants' argument that the Amended Complaint "merely 'put[] old wine in new bottles,'" and concluded that "nothing has appreciably changed between Plaintiff's original Complaint and the filing of the Amended Complaint that would alter the Courts' decision[.]" Doc. 103 at 13; *see also* Doc. 95-1 at 19. The Court therefore maintained its original view that "the ruling in [*Hellerstedt*] allows for ... cumulative challenges" to abortion laws. Doc. 103 at 12.

[8] The district court dismissed Plaintiffs' Amended Complaint to the extent that it challenges certain procedural aspects of Louisiana's abortion clinic licensing system. Doc. 103 at 16–19. Those challenges had given rise to the procedural due process claim in Plaintiffs' original Complaint, which the district court dismissed as unripe. Doc. 60 at 15–16.

The district court also acknowledged that Plaintiffs failed to plead individual challenges to all the health statutes and licensing regulations Plaintiffs identified. *Id.* at 14 ("In a vacuum, Defendants' arguments appear persuasive."). But it held that under *Hellerstedt*, Plaintiffs do not need to:

> [T]o take on each regulation, individually and separately, directly contradicts the guidance set forth in the *Hellerstedt* ruling. Plaintiffs would be placed in an untenable position where they are forced to individually challenge many facially valid regulations, despite the fact that, taken together, such provisions may violate the directives of both *Planned Parenthood* and *Casey* [*sic*].

Id. at 14–15. The district court's reasoning rested on its apparent view that holding Plaintiffs to ordinary pleading standards would limit the number and breadth of challenges to abortion regulations:

> Forcing Plaintiffs to address each regulation individually, and without sufficient context, may result in the inability to challenge legislation with component parts that may appear innocuous, but when taken together, impermissibly infringe on a woman's constitutional right to avail herself of abortion procedures.

Id. at 15. As for Defendants' pleading and jurisdictional concerns, the district court held that Plaintiffs need only give Defendants "notice" of which laws they intend to challenge, with clarity to come later "to the extent possible":

> Defendants are sufficiently on notice that Plaintiffs intend to cumulatively, and to the extent possible, individually, challenge the validity of the statutes and regulations that govern abortion providers in the State of Louisiana, as allowed under *Hellerstedt*.

Id. Even as to Plaintiffs' claims as to particular statutes and regulations in Counts II and III, the district court made no effort to identify which were justiciable and well-pleaded and which were not.

The Court also reversed course on interlocutory appeal. Although the Court again acknowledged "that Plaintiffs' Amended Complaint merely repackages many of the same arguments made in their original complaint," the court — with little supporting analysis — denied certification. *Id.* at 19—20.

REASONS WHY THE WRIT SHOULD ISSUE

The district court's remarkable ruling goes beyond the limits of federal jurisdiction while substantially infringing Louisiana's sovereignty, and thus richly merits the extraordinary relief of mandamus. For a writ of mandamus to issue, three requirements must be satisfied: (1) "the petitioner must show that [its] right to issuance of the writ is clear and indisputable;" (2) "the party seeking issuance of the writ must have no other adequate means to attain the relief [it] desires;"

and (3) "the issuing court, in exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *In re Volkswagen*, 545 F.3d 304, 311 (5th Cir. 2008) (en banc) (quotes and alteration omitted) (quoting *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004)). The writ "is appropriately issued … when there is 'usurpation of judicial power' or a clear abuse of discretion[.]" *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964); *see also Volkswagen*, 545 F.3d at 311; *In re United States*, 397 F.3d 274, 282 (5th Cir. 2005); *In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992). Those requirements are met here.

I. DEFENDANTS ARE "CLEARLY AND INDISPUTABLY" ENTITLED TO THE WRIT.

The district court's order denying dismissal permits Plaintiffs to bring *en masse* challenges against dozens of separate laws regulating distinct aspects of abortion, even when Plaintiffs have not brought well-pleaded, justiciable claims against each challenged law. The district court does not appear to dispute that characterization. Instead, it maintains that in abortion litigation, holding Plaintiffs to ordinary pleading and jurisdictional standards would be an "untenable" burden. Doc. 103 at 14–15. That forces State officers to defend an entire system of laws that

Plaintiffs have not adequately challenged individually, and many of which Plaintiffs may lack standing to challenge at all. In other words — *when it comes to abortion* — Article III, State sovereign immunity, and the federal Rules should not get in the way of Plaintiffs' effort to bring down a whole system of common-sense health, safety, and licensing laws and to inaugurate an era of judicial supervision.

That is a shocking abuse of federal judicial authority that directly violates applicable decisions of the Supreme Court and this Court. "Abortion" is not a magic word to dismiss jurisdictional and pleading rules that get in the way of abortion providers and their attorneys. The writ of mandamus exists to correct situations like this one, where a lower court's errors "produce a patently erroneous result." *Volkswagen*, 545 F.3d at 310. And when mandamus is sought in order to "confine a trial court to a lawful exercise of its prescribed authority, the court should issue the writ almost as a matter of course." *In re Reyes*, 814 F.2d 168, 170 (1987) (quoting *United States v. Denson*, 603 F.2d 1143, 1145 (5th Cir. 1979) (en banc)) (quotes omitted).[9] This Court should do so here.

[9] Mandamus is especially appropriate when necessary to stop "'intrusion by the federal judiciary on a delicate area of federal-state relations[.]'" *Cheney*, 542 U.S. at 381; *see also People of State of Cal. v. Mesa*, 813 F.2d 960, 963 (9th Cir. 1987)

A. Supreme Court And Fifth Circuit Authority Rule Out Challenges To The Cumulative Effects Of Abortion Regulations.

Defendants have a "clear and indisputable" right to mandamus relief because Supreme Court and Fifth Circuit caselaw foreclose Plaintiffs' cumulative-effects theories. Simply put, there is no such thing as a challenge to the cumulative effects of multiple abortion regulations, independent of those regulations' individual effects.

1. The district court recognized a non-existent cause of action that Supreme Court and Fifth Circuit cases unambiguously preclude.

The district court's decision directly contradicts the most relevant precedent of this Court. While Defendants' second motion to dismiss was pending, this Court decided *JMS*. Plaintiffs in *JMS* — including two of the Plaintiffs here — challenged Louisiana's hospital admitting privileges requirement for doctors performing abortions. They supported their challenge with reference to "other abortion regulations … unrelated to admitting privileges," including previous codifications of some of the statutes challenged here. *JMS*, 905 F.3d at 810 n.60. The district court agreed, and "factored into its substantial-burden analysis that Louisiana

("[F]ederalism concerns justify review by mandamus[.]"), *aff'd sub nom. Mesa v. California*, 489 U.S. 121 (1989).

is a strongly anti-abortion state." *Id.* This Court, relying on *Hellerstedt* and *Casey*, correctly held that "unrelated" statutes "ha[d] no bearing on the constitutionality" of the admitting-privileges requirement and therefore could not be considered. *Id.* Abortion providers thus cannot prove the burdens of *one* abortion law by pointing to a *different* law addressing *separate* subject matter (or to the State's alleged atmosphere of abortion regulation): the very definition of Plaintiffs' cumulative-effects challenge. Defendants directed the district court's attention to that aspect of *JMS*, Doc. 100 at 1–2, but the district court did not even cite it, flatly ignoring this Court's binding direction. Mandamus should issue for that reason alone.[10]

The Supreme Court has also evaluated the burdens of challenged abortion laws one at a time — a practice that dates back to *Doe v. Bolton*, 410 U.S. 179 (1973), the companion case to *Roe v. Wade*, 410 U.S. 113 (1973). In *Doe*, the Court considered a number of procedural requirements limiting abortion access in Georgia, including restrictions

[10] *JMS* follows a history of Fifth Circuit cases addressing abortion requirements separately instead of cumulatively. *K.P. v. LeBlanc*, 729 F.3d 427, 436 (5th Cir. 2013) (treating challenge to Louisiana law (1) creating a cause of action for patients against abortion providers and (2) precluding abortion providers from accessing State medical malpractice fund as "two separate claims," and dismissing both on different grounds).

on where, by whom, and for whom abortions could be performed. The Court could have looked to the statutes' cumulative effects, but instead evaluated their constitutionality individually. 410 U.S. at 193–202.

The Supreme Court has followed that approach ever since. For example, *Casey* reviewed five distinct provisions of Pennsylvania law. 505 U.S. at 833. The Court's controlling opinion analyzed each provision individually and held that some imposed undue burdens on a woman's decision to obtain an abortion while others did not. *See id.* at 879 ("We now consider the separate statutory sections at issue."). *See also Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (analyzing five provisions of Missouri abortion law "*seriatim*"); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62–63 (1976) ("Our primary task ... is to consider *each of the challenged provisions* of the new Missouri abortion [statute] in the particular light of ... *Roe* and ... *Doe*.") (emphasis added). There has been no analysis of cumulative burdens.

The Court's provision-by-provision approach was necessary to its analysis in *Ohio v. Akron Center for Reproductive Health*, where a dissenting opinion criticized the majority for "consider[ing] each provision in a piecemeal fashion, never acknowledging or assessing the

'degree of burden that the entire regime of abortion regulations' places' on the minor [seeking an abortion]." 497 U.S. 502, 527 (1990) (Blackmun, J., dissenting). The majority's approach obviously binds this Court. *See Centennial Ins. Co. v. Ryder Truck Rental, Inc.*, 149 F.3d 378, 385 (5th Cir. 1998) (explaining that a court's "analysis … provides the basis for the court's holding").

Plaintiffs and the district court emphasize the Supreme Court's decision in *Hellerstedt*. If the district court treated *Hellerstedt* as impliedly overruling the Supreme Court's prior standard, it violated the rule that the Supreme Court retains "the prerogative of overruling its own decisions," even in the event of perceived tension among the Court's cases. *See Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484 (1989). This Court's holdings in *JMS*, moreover, authoritatively interpreted *Hellerstedt* and precluded the district court from charting its own inconsistent course. The district court's single-minded reliance on *Hellerstedt* thus fails on its own terms.

In any event, *Hellerstedt* followed the traditional rule. The *Hellerstedt* Court considered two statutes originating in a single Texas bill: one requiring that physicians performing abortions have "active

admitting privileges" at a local hospital, and another requiring that abortion clinics meet all of the standards for "ambulatory surgical centers." The Court addressed those provisions separately, ultimately concluding that both independently imposed undue burdens. *Id.* at 2310–18. It *could* have tried to analyze the laws' cumulative effects, but did not.[11]

The district court nonetheless read *Hellerstedt* to obviate separate analyses of individual laws, focusing on one passage in particular:

> The Court in *Hellerstedt* opined that courts "[are not required] to go through the individual components of the different, surgical center statute, let alone the individual *regulations* governing surgical centers to see whether those requirements are severable from each other as applied to abortion facilities."

Doc. 103 at 12–13 (quoting *Hellerstedt*, 136 S. Ct. at 2319–20). But that reasoning takes *Hellerstedt*'s language out of context. A single Texas statute made the State's preexisting ambulatory surgical center regulations applicable to abortion clinics, with no opportunity for waivers or grandfathering. *Hellerstedt*, 136 S. Ct. at 2300 (citing Tex. Health & Safety Code Ann. § 245.010(a)). The Supreme Court reviewed that

[11] On remand, this Court applied the Supreme Court's mandate by addressing the two provisions separately. *Whole Woman's Health v. Hellerstedt*, 833 F.3d 565 (5th Cir. 2016) (per curiam).

statute and enjoined it as facially unconstitutional. It does not follow that Plaintiffs can challenge collections of statutes and regulations together, or that they can challenge the entirety of OAFLL — itself a collection of statutes — and at one stroke challenge the entire panoply of implementing regulations.

The quoted language in *Hellerstedt*, moreover, related to the Texas bill's broad severability clause. Texas argued that "instead of finding the entire surgical-center provision unconstitutional, [the Court] should invalidate (as applied to abortion clinics) only those specific surgical-center regulations that unduly burden the provision of abortions, while leaving in place other surgical-center regulations." *Id.* at 2319. But as the Court explained, doing so would violate the intent of the legislature: "The statute was meant to require abortion facilities to meet the integrated surgical-center standards—not some subset thereof. The severability clause refers to severing applications of words or phrases *in the Act*, such as the surgical-center requirement as a whole." *Id.* It could not extend to separate regulatory provisions incorporated by refence, since "[f]acilities subject to some subset of those regulations do not qualify as surgical centers." *Id.* at 2320. In other words, the *Hellerstedt* Court enjoined

application of the ambulatory surgical center regulations to Texas abortion clinics not based on their cumulative effects, but because it *had* to in order to apply the Texas legislature's direction to treat the regulations as a single whole. It does not follow from *Hellerstedt*, in short, that Plaintiffs can challenge different statutes and regulations on different subjects on an aggregate basis.

2. Individualized undue burden analysis is the only workable standard for reviewing State abortion restrictions.

As Plaintiffs' own pleadings illustrate, only an individualized, provision-by-provision analysis of abortion laws makes sense under either an undue burden or an equal protection analysis.

Louisiana's abortion statutes and regulations (including the ones challenged here) are motivated by myriad legitimate interests: to protect patient health and safety, to safeguard the integrity of the medical profession, to promote respect for unborn life, and to ensure that when women consider the "grave" abortion decision, they do so with knowledge of all the facts. *See Gonzales*, 550 U.S. at 159. The statutes Plaintiffs challenge apply to diverse aspects of abortion such as physician qualifications, La. R.S. § 40:1061.10(A)(1); clinic administration, La. R.S.

§ 40:1061.19; and informed consent, La. R.S. § 40:1061.17(B). The licensing regulations that implement OAFLL cover an even wider field. Plaintiffs concede the range and variety of those requirements. *See*, *e.g.*, Doc. 87 at 3, ¶ 6 (challenged laws cover "virtually every aspect of patient care and business operations"); *id.* at 23, 25, 27, 28, 31. The different effects and justifications for such diverse laws cannot be added up and cannot be readily compared to each other by any judicially manageable standard, leaving no way an Article III court can review them together rather than individually.

On the contrary, the cumulative challenge Plaintiffs seek to bring calls for a *political* inquiry inconsistent with the institutional role of Article III courts. It is one thing to evaluate whether a particular law is rational under equal protection, *see Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 419 (5th Cir. 2001), or creates an undue burden "compared to prior law" under substantive due process, *see Hellerstedt*, 136 S. Ct. 2311. It is quite another thing to consider whether an entire regulatory *system* is rational, or whether it is burdensome compared to an imaginary world where it does not exist. That calls on a court not to judge the particular consequences of particular challenged statutes, but

to evaluate the overall wisdom of a State's regulatory decisions, based on whatever combination of statutes and regulations a plaintiff might choose to challenge in a given lawsuit.

The consequences of Plaintiffs' theory are absurd. For example — even aside from Plaintiffs' decision to challenge OAFLL itself — if Plaintiffs can bring a cumulative-effects challenge against thirteen regulations (Count I) or thirteen regulations and twelve statutes (Count V), they might next challenge *hundreds* of statutes and regulations. Likewise, if Plaintiffs fail in a cumulative-effects challenge to one combination of statutes and regulations, they might add one more law and file a new complaint. They might even raise a new cumulative-effects challenge every time a new regulation is promulgated. Concepts of precedent, stare decisis, and claim preclusion would no longer have any meaning in abortion litigation.

State lawmakers and regulators cannot be expected to do their work knowing that each new or amended law jeopardizes the whole regulatory edifice. And perhaps that is Plaintiffs' real objective.

B. The District Court Exceeded The Bounds Of Federal Judicial Authority By Allowing A Cumulative-Effects Challenge Without Well-Pleaded Challenges Against Particular Laws.

Even if Plaintiffs could sue over the cumulative effects of abortion regulations, such a device would only make sense if it combined laws already subject to individualized, well-pleaded, and justiciable claims. Otherwise, a cumulative-effect challenge evades pleading and jurisdictional rules: Parties could seek to enjoin laws they have no standing to challenge, or did not challenge with well-pleaded facts, simply by bundling the laws and intoning "cumulative effects." That is exactly what Plaintiffs did here. The district court recognized Plaintiffs' strategy for what it was, but let them get away with it. The district court did not even analyze whether Plaintiffs' *individual* claims were each justiciable and well-pleaded (which many of them plainly were not). Mandamus should issue for that reason too.

There is no real dispute that Plaintiffs' cumulative-effects and individual challenges cover laws Plaintiffs have not adequately challenged. By challenging OAFLL, Plaintiffs challenge regulations their Amended Complaint does not even mention, including ones they could not credibly challenge, *see* La. Admin. Code § 48:4447 (requiring sterile

instruments); La. Admin. Code § 48:4425(F) (requiring reporting of crimes against children), and ones where the Amended Complaint does not disclose any basis for Plaintiffs' standing, *see* La. Admin. Code § 48:4409 (establishing procedures for changes in a clinic's contact information or management personnel); La. Admin. Code § 48:4457 (establishing procedures for license inactivation in the event of a declared disaster or emergency).[12] The statutes and regulations Plaintiffs *do* expressly challenge include many that Plaintiffs only mention, with no factual explanation. *See supra* at 10–13. All this is obvious from the face of Plaintiffs' Amended Complaint. *See id.*; Doc. 87 at 16–23.

The district court did not disagree. On the contrary, it agreed that on this point "Defendants' arguments appear persuasive." Doc. 103 at 14. Instead, the district court held that ordinary standards do not apply: In abortion litigation, the court reasoned, it would be "untenable" to expect Plaintiffs "to address each regulation individually[.]" *Id.* at 15. Applying the rules would leave fewer challenges to abortion regulations than the

[12] Plaintiffs challenge to OAFLL itself — rather than limiting their challenge to implementing regulations — implies that Louisiana is somehow *disabled* from enacting licensure requirements specific to abortion clinics. The Supreme Court and this Court rule out such an argument. *Simopoulos v. Virginia*, 462 U.S. 506, 518–19 (1983); *see also Bell*, 248 F.3d at 419 (observing that "without violating the Constitution, the State could have required all abortion providers to be licensed").

district court would like to see: "Forcing Plaintiffs to address each regulation individually, and without sufficient context, may result in the inability to challenge [abortion] legislation[.]" *Id.* at 15. For that reason, the Court declined to ensure that Plaintiffs' cumulative-effects and individual challenges were limited to well-pleaded, justiciable claims.

The effect of that language, quite simply, is to excuse abortion providers from following — and lower courts from enforcing — rules that apply to everyone else. The bedrock of federal jurisdiction is that a case *cannot* proceed unless plaintiffs establish standing and give the intended defendants fair notice of the facts of specific claims that an Article III court has jurisdiction to adjudicate. *See*, *e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (to satisfy Rule 8, complaint must give "fair notice of what [plaintiffs'] claim is and the grounds upon which it rests"); *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990) ("[B]efore a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue[.]"); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998) ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very

definition, for a court to act ultra vires."). An Article III court has a "constitutional obligation to satisfy [itself] that subject matter jurisdiction is proper," *Ziegler v. Champion Mortg. Co.*, 913 F.2d 228, 229 (5th Cir. 1990), and to address jurisdiction with precision even where litigants do not.

An individualized showing of standing is especially important here. Standing to challenge one part of a regulatory system does not entail standing to challenge any other part:

> [S]tanding is not dispensed in gross. If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law.

Lewis v. Casey, 518 U.S. 343, 358 n.6 (1996). And here, where Plaintiffs raise due process challenges on behalf of their patients, Doc. 87 at 1, so-called "third-party standing" requires that Plaintiffs' interests align with their patients'. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 589 & n.9 (5th Cir. 2014); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 & n.7 (2004) (potential conflict of interest defeats third-party standing). Given that Plaintiffs challenge health regulations intended to ensure *more* patient protection

than Plaintiffs would provide otherwise, Plaintiffs and their patients are in potential conflict. Plaintiffs' standing must be scrutinized, not rubber-stamped.

The notion that Plaintiffs can get into federal court merely by identifying statutes and asserting a cumulative burden flatly violates all of those principles. Suspending pleading and jurisdictional rules when a particular set of litigants pursues a preferred set of policy goals is not only lawless; it undermines the very institution of Article III courts as impartial deciders of cases and controversies. This Court should grant mandamus to "confine [the district court] to a lawful exercise of its prescribed authority[.]" *Reyes*, 814 F.2d at 170.

C. Plaintiffs' Cumulative-Effect Challenges Violate Louisiana's Sovereign Immunity.

Defendants are "clearly and indisputably entitled" to the writ for a related and equally compelling reason. To establish jurisdiction, Plaintiffs nominally rely on the doctrine of *Ex parte Young*, which creates an exception to State sovereign immunity for prospective injunctive relief against State officers. 209 U.S. 123 (1908). But courts reject claims that "stretch [*Ex parte Young*] too far and would upset the balance of federal and state interests that it embodies." *Papasan v. Allain*, 478 U.S. 265,

277 (1986). Such claims must be dismissed for lack of jurisdiction. *See* U.S. Const. amend XI. This is just such a case.

Generally speaking, *Young* permits parties to sue a State officer in order to enjoin "an unconstitutional act" that threatens them. 209 U.S. at 156. Here, however, Plaintiffs are not challenging an act, but a wide range of independent legislative and regulatory decisions, made for many different reasons over an extended period, because they add up to an overall state of affairs that Plaintiffs do not like. Plaintiffs' claims would shift control of State abortion regulation from State instrumentalities to the district court — as Plaintiffs have previously urged. Doc. 32 at 10. "To pass this off as a judgment causing little or no offense to [Louisiana's] sovereign authority and its standing in the Union would be to ignore the realities of the relief the [Plaintiffs] demand[]." *Idaho v. Coeur d'Alene Tribe of Idah*o, 521 U.S. 261, 282 (1997) (holding that sovereign immunity barred lawsuit intended to obtain title to State lands).

In such circumstances — where Plaintiffs' alleged injuries are not tethered to any particular act or policy, as *Young* presumes, and where the result would be for a federal court to commandeer State policy in order to procure Plaintiffs' preferred policy results — the State itself is

the real party in interest, and its sovereign immunity applies.[13] For that reason, too, Defendants are entitled to a writ of mandamus ordering the district court to dismiss the relevant counts of Plaintiffs' Amended Complaint.

II. THE OTHER REQUIREMENTS FOR MANDAMUS ARE SATISFIED.

As shown above, Defendants are clearly and indisputably entitled to relief. The remaining elements of mandamus relief — Defendants' lack of any other means of adequate relief, and the propriety of mandamus under the circumstances — are readily met as well.

A. Defendants Cannot Obtain Adequate Relief By Any Other Means.

To begin with, Defendants have no real alternative to mandamus. The district court — having abdicated its responsibility to identify the limits of its jurisdiction, *Ziegler*, 913 F.2d at 229 — has also denied certification for interlocutory appeal. Doc. 103 at 19–20. That leaves mandamus as the last opportunity to contain the lower court litigation within proper jurisdictional bounds.

[13] *See also Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018) (explaining that the federal government cannot commandeer State governments).

Nor should Defendants be forced to wait for a direct appeal. Plaintiffs, by their own admission, view this case as the first step toward ongoing judicial supervision of State regulatory processes. *See* Doc. 32 at 10 & n.5. Louisiana now faces litigation covering every application of those abortion regulations, without notice of what is genuinely at issue. Louisiana women would nominally be represented by Plaintiffs without assurance that Plaintiffs have standing to do so. Nor is there a judicially manageable standard that can evaluate the total effect of a whole regulatory regime. Without notice, jurisdiction, or standards, trial and judgment — not to mention the discovery attendant to such sweeping, vague claims — would be a travesty.

Far from a simple error to be corrected on appeal, further proceedings would be an ongoing ultra vires burden on Defendants and Louisiana's sovereignty that should be put to an immediate stop. *See Schlagenhauf*, 379 U.S. at 110 ("The writ is appropriately issued … when there is 'usurpation of judicial power'[.]"). When mandamus is sought in order to "confine a trial court to a lawful exercise of its prescribed authority, the court should issue the writ almost as a matter of course."

Reyes, 814 F.2d at 170 (quoting *Denson*, 603 F.2d at 1145) (quotes omitted).

Similarly, this Court considers direct appeal inadequate when the district court's error, if not corrected by mandamus, "will have worked irreversible damage and prejudice by the time of final judgment." *In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 289 (5th Cir. 2015). This Court, for example, has issued mandamus where petitioners otherwise "would be trapped in a federal forum they did not choose" and which lacked jurisdiction. *In re Dutile*, 935 F.2d 61, 63–64 (5th Cir. 1991). And although unrecoverable costs of litigation typically do not make direct appeal inadequate, *Lloyd's Register*, 780 F.3d at 289, this Court *has* granted mandamus where "the nature and size of th[e] litigation would seem to preclude effective appellate review upon final judgment." *In re Am. Airlines, Inc.*, 972 F.2d 605, 609 (5th Cir. 1992). Vast, standardless litigation over the justifications for an entire system of health and safety regulation surely meets that test. This Court's mandamus precedents, in short, readily permit this Court to halt Plaintiffs' cumulative-effects challenges.

B. This Court Should Exercise Its Discretion To Grant The Writ.

Finally, mandamus is an appropriate exercise of this Court's discretion. Mandamus is appropriate both "as a one-time device to 'settle new and important problems' that might have otherwise evaded expeditious review," *In re JPMorgan Chase & Co.*, 916 F.3d 494, 499 (5th Cir. 2019) (quoting *In re EEOC*, 709 F.2d 392, 394 (5th Cir. 1983) (itself quoting *Schlagenhauf*, 379 U.S. at 111)) (quotes omitted), and where "the issues presented and decided above have an importance beyond" the case at hand, *Volkswagen*, 545 F.3d at 319. Both formulations justify mandamus here — to correct the district court's egregious misapplication of law, and to stem a tide of similar cumulative-effect claims that are pending against State abortion regulations elsewhere in this Circuit.

The district court has already agreed with Defendants that Plaintiffs' claims deserve interlocutory review. As the district court said when it originally granted Section 1292(b) certification, Plaintiffs' cumulative-effects theories involved "a difficult issue," and Defendants "raise a threshold question concerning whether Plaintiffs' key claim is colorable." Doc. 76 at 3. Although the district court since denied certification as to Plaintiffs' amended pleadings, the court still "largely

agrees with Defendants that Plaintiffs' Amended Complaint merely repackages many of the same arguments made in the original Complaint[.]" Doc. 103 at 20.

The only relevant difference the district court identified between Plaintiffs' original and amended pleadings is that the Amended Complaint "sufficiently pled a cause of action for each challenged regulation or statute on an individual basis." *Id.* That assessment is false on its face, *see supra* at 10–13, 28–32, irrelevant to whether Plaintiffs can raise cumulative-effects challenges in the first place (or reach an entire regulatory system by challenging OAFLL), and inconsistent with the district court's more accurate admission that compelling Plaintiffs to satisfy ordinary pleading and jurisdictional standards would be "untenable" in an abortion case. *Id.* at 15. There is no reasoned basis to diverge from the district court's own original view that early appellate review *is* warranted.

Even if this case alone did not call for mandamus, it is a harbinger of things to come. Defendants are aware of multiple similar cumulative-effects claims filed in district courts across the Nation. Another one involving most of the same parties is pending before the very same

district court, *June Med. Servs., LLC v. Gee*, No. 3:17-cv-404 (M.D. La.), Doc. 88 at 39, and others have been filed in Texas and Mississippi — in other words, at least one in every State in this Circuit. *See Jackson Women's Health Org. v. Currier*, No. 3:18-cv-171 (S.D. Miss.), Doc. 23 at 55; *Whole Woman's Health All. v. Paxton*, No. 1:18-cv-500 (W.D. Tex.), Doc. 1 at 39.[14] Although the plaintiffs in some of those cumulative-effects challenges may have since amended their litigation positions, abortion providers plainly believe that *Hellerstedt* created a new framework that supports undue burden challenges to entire legislative and regulatory schemes.

Given the opportunity presented here, clarity should come as soon as possible. This Court should take the opportunity to reassert this Court's precedent and confirm that *Hellerstedt* was not the jurisdiction-expanding, sovereignty-destroying watershed Plaintiffs make it out to be.

CONCLUSION

This Court should grant a writ of mandamus and order the district court (1) to dismiss Counts I and V of the Amended Complaint, and (2) to

[14] Others are pending against other States, with the most recent filed only a month ago. *Whole Woman's Health All. v. Hill*, No. 1:18-cv-1904 (S.D. Ind), Doc. 1 at 39; *Falls Church Med. Ctr., LLC v. Oliver*, No. 3:18-cv-428 (E.D. Va.), Doc. 41 at 62; *Planned Parenthood Ariz., Inc. v. Brnovich*, No. 4:19-cv-207 (D. Ariz.), Doc. 1 at 54.

evaluate Plaintiffs' challenges to individual abortion laws under the correct pleading and jurisdictional standards.

Respectfully submitted,

/s/ Elizabeth B. Murrill

Stephen S. Schwartz
James A. Heilpern
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
SSchwartz@Schaerr-Jaffe.com
JHeilpern@Schaerr-Jaffe.com

Elizabeth B. Murrill
Solicitor General
Joseph Scott St. John
Deputy Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. 3rd St.
Baton Rouge, LA 70802
(225) 326-6766
MurrillE@ag.louisiana.gov
StJohnJ@ag.louisiana.gov

Counsel for Petitioners

CERTIFICATE OF SERVICE

I certify that on May 3, 2019, I filed the foregoing brief with the Court's CM/ECF system and caused copies to be delivered by Federal Express and e-mail to Plaintiffs' counsel of record:

Shannon Selden
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
(212) 909-6082
srselden@debevoise.com

I further certify that on May 3, 2019, I caused a copy to be delivered to the district court by Federal Express:

Hon. Brian A. Jackson
U.S District Court, Middle District of Louisiana
777 Florida Street, Suite 375
Baton Rouge, LA 70801

/s/ Elizabeth B. Murrill
Elizabeth B. Murrill
Attorney for Petitioners

CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 21(d)(1) because it contains **7,765** words, exclusive of parts of the brief exempted.

2. This brief complies with Federal Rule of Appellate Procedure 32(c)(2), including the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2011, Century Schoolbook, 14-point font.

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/s/ Elizabeth B. Murrill
Elizabeth B. Murrill
Attorney for Petitioners

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